AMICUS BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION
IN SUPPORT OF APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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NO. 12-1925

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OPENBAND AT LANSDOWNE, LLC, *ET AL.*,

APPELLANTS,

V.

LANSDOWNE ON THE POTOMAC
HOMEOWNERS ASSOCIATION INC.,

APPELLEE.

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ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF VIRGINIA

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AMICUS BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION
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## STATEMENT OF INTEREST

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, the Federal Communications Commission respectfully submits this brief as amicus curiae. This case involves review of a district court's interpretation of an FCC Order and rule. *See* 47 C.F.R. § 76.2000; *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235 (2007), 73 Fed. Reg. 1080 (Jan. 7, 2008) ("*Exclusivity Order*") (adopting 47 C.F.R. § 76.2000).

The FCC has an interest in ensuring that its regulations and precedents are correctly interpreted, and that its fair and considered interpretive views are accorded due deference, even when embodied in an amicus brief. *See Talk Am. v. Mich. Bell Tel. Co.*, __ U.S. __, 131 S. Ct. 2254, 2260-61 (2011).

## STATEMENT OF FACTS

### I. BACKGROUND

#### A. The 1992 Cable Act and the Telecommunications Act of 1996.

Concluding that "most cable television subscribers have no opportunity to select between competing cable systems," Congress in 1992 enacted a number of measures designed to promote competition and diversity of sources of information in the pay-TV market. Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), P.L. 102-385, § 2(a)(2), 47 U.S.C. § 521 nt. Among other things, Congress forbade local franchising authorities from granting exclusive franchises, 47 U.S.C. § 541(a)(1).

As part of the 1992 Cable Act, Congress also enacted 47 U.S.C. § 548 (often referred to as section 628, for its placement in the Communications Act). Designed "to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable

programming and satellite broadcast programming to persons in…areas not currently able to receive such programming, and to spur the development of communications technologies," section 628 makes it

> unlawful for a cable operator…to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

47 U.S.C. §§ 548 (a)-(b).[1]

**B. Early Focus on MDU Exclusivity.**

After the passage of the 1992 Cable Act, and in light of the as-yet meager inroads made by would-be competitors to incumbent cable operators, the FCC began a series of rulemakings to foster competition among multichannel video programming distributors ("MVPDs"). Among these

[1] Although the statute refers to "cable operators," it is also made applicable to OVS operators under 47 U.S.C. § 573(c)(1)(A). An OVS operator is "[a]ny person or group of persons who provides cable service over an open video system and directly or through one or more affiliates owns a significant interest in such open video system, or otherwise controls or is responsible for the management and operation of such an open video system." 47 C.F.R. § 76.1500(b). An open video system, or OVS, is a regulatory classification of video programming distributor created by the 1996 Act. *See* 47 U.S.C. § 573; *City of Dallas v. FCC*, 165 F.3d 341, 346 (5th Cir. 1999). An OVS is similar to a cable system except that, in exchange for reserving platform space for unaffiliated programmers, OVS operators are freed from certain regulations applicable to cable operators. *Id.*

measures were rules focusing on MVPDs that service multiple dwelling units ("MDUs").[2] *See, e.g., Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 13 FCC Rcd 3659 (1997) (making it easier for an MDU owner to switch to another MVPD and for a competitor MVPD to install wiring in a building already wired by an incumbent MVPD). During these rulemakings, a number of providers raised the issue of exclusive service contracts between MDU owners and video service providers. Phone companies and other providers seeking entry into the MVPD market argued that these exclusive contracts with MDUs forstalled competition by restricting access to customers. In 1997, the FCC sought comment on whether and how to limit those exclusive arrangements. *Id.* at ¶¶ 191-192, 259.

[2] FCC rules define MDU to include "an apartment building, condominium building, or cooperative" as well as "other centrally managed real estate development[s]…such as a gated community, mobile home park, or garden apartment." 47 C.F.R. § 76.2000(b).

### C. The *Exclusivity Order*

In 2003, the Commission found that the record at that point reflected "both pro-competitive and anti-competitive aspects of exclusive contracts."[3] Because the FCC could not conclude, based on the available record, that exclusive contracts between MVPDs and MDU owners were predominately anti-competitive, it declined to forbid them at that time. *Id.*

However, in early 2007, spurred in part by comments in another proceeding that analogized cable/MDU exclusive access agreements to the entry barriers posed by the local franchising process, the Commission initiated a renewed examination of the issue.[4] A host of entities filed comments, including large and small cable companies, other types of MVPDs, builders and managers of MDUs, consumer groups, and programming consumers. *Exclusivity Order* ¶ 6. Among these was OpenBand Multimedia, L.L.C., which argued that its "exclusive contracts" were essential to its ability to recoup investment. Comments of OpenBand

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[3] *In re Telecommunications Services Inside Wiring, Customer Premises Equipment and Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, 18 FCC Rcd 1342 ¶ 71 (2003), *remanded in part, Nat'l Cable & Telecomm. Ass'n v. FCC*, 89 Fed. Appx. 743 (D.C. Cir. 2004).

[4] *See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 5935 ¶¶ 4-5 (2007).

Multimedia, L.L.C. at 3-4, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51 (July 2, 2007) ("*OpenBand Comments*"); *see Exclusivity Order* nn.72, 76-77, 104, 116 (citing *OpenBand Comments*). In contrast, many commenters stressed the competitive harms that stem from exclusivity, including holding back competitors from offering video programming or a "triple play" of video, phone, and broadband service. *See Exclusivity Order* ¶ 17-23. The Commission also noted harms to consumers, especially because an exclusive right may be granted by the developer of an MDU with interests that diverge from the residents who will later live there. *Id.* at ¶ 22.

On this record, in 2007 the Commission unanimously adopted the *Exclusivity Order*. That order concluded that contracts granting cable operators exclusive access to MDUs "harm competition and broadband deployment and that any benefits to consumers are outweighed by the harms of such clauses." *Exclusivity Order* ¶ 1. The adopted rule states:

> No cable operator or other provider of MVPD service subject to 47 U.S.C. § 548 shall enforce or execute any provision in a contract that grants to it the exclusive right to provide any video programming service (alone or in combination with other services) to a MDU. All such exclusivity clauses are null and void.

47 C.F.R. § 76.2000. The Commission explained that, in adopting the rule, it intended to reach those "exclusivity clauses" that "prohibit any other MVPD from any access whatsoever to the premises of the MDU building or real estate development." *Exclusivity Order* ¶ 1 n.2.

The U.S. Court of Appeals for the D.C. Circuit upheld the *Exclusivity Order* in 2009, finding it "well within the bounds of both section 628 and general administrative law." *Nat'l Cable & Telecomm. Ass'n v FCC*, 567 F.3d 659, 661 (D.C. Cir. 2009). In so doing, the court rejected the argument that the rule "impermissibly regulates the real estate industry, which lies outside the Commission's jurisdiction," explaining that the terms of the rule "apply only to cable companies…and they neither require nor prohibit any action by MDUs." *Id.* at 666-667 ("We decline to put issues relating to [MDU residents'] cable service outside the Commission's authority simply because those issues also matter to their landlords.").

## II. THIS CASE

### A. Parties and Agreements

In 2001—four years after the FCC first announced that it was reviewing the permissibility of exclusive arrangements in MDUs—appellants entered into a series of agreements with appellee regarding video programming and other utilities for Lansdowne on the Potomac, a planned

community in Loudoun County, Virginia. Op. at 3-9. Because of their importance to this case, we discuss these agreements in some detail.

First, the developer of Lansdowne in conjunction with appellant M.C. Dean, a technical services contractor that specializes in communications systems, jointly established OpenBand at Lansdowne LLC ("OpenBand").[5] Op. at 3. The developer also established appellee, Lansdowne on the Potomac Homeowners Association, Inc. ("Lansdowne HOA"). *Id.* While the developer still controlled the HOA, the developer, the HOA, and OpenBand then entered into a series of agreements related to the provision of video programming, Internet services, and telephony:

*Agreement to Obtain Telecommunications Services ("TSA")*— OpenBand and Lansdowne HOA signed a contract in which OpenBand agrees to "be the provider or arrange for the provision of the Platform Services," defined to include video programming as well as Internet and

[5] The developer no longer has an interest in OpenBand. Op. at 3 n.3. OpenBand, which has no employees of its own, has entered into an agreement with another M.C. Dean entity, OpenBand Multimedia, LLC ("Multimedia"), for the provision of video programming and Internet services at Lansdowne. Op. at 4. Multimedia is certified by the FCC as an open video system (OVS) operator. *See OpenBand Multimedia, Inc.: Certification to Operate an Open Video System*, 15 FCC Rcd 24153 (2000) ("*OpenBand OVS Certification*").

wireline telephone service. Complaint, Exh. 1 § 2.1 ("*TSA*").[6] Lansdowne HOA is prohibited from engaging another provider for Platform Services, but the TSA states that individual residents may obtain services, including Platform Services, from other providers.[7] *Id.* § 2.2.3.

*Exclusive Easement for Telecommunications Services*—In documents signed the same day, the developer granted an "exclusive easement" to OpenBand for the purpose of constructing and operating ("Administering") the infrastructure necessary for the provision of "video, telephonic, internet, data services or other communications" (the "Utilities"). Complaint, Exh. 3 § 2(a) ("*OpenBand Easement*").[8] That document states that these "exclusive easements" shall "be deemed to reserve solely to Grantee" (i.e., OpenBand) these rights, and that "no other person or entity shall be entitled to Administer any Utilities on, under or across [the Lansdowne development] without the

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[6] The term "Telecommunications Services" in the TSA and easements includes Internet and video programming services and so has a broader meaning than that term under the Communications Act. *See* 47 U.S.C. § 153(53).

[7] As explained below, residents' right to obtain alternate services is illusory because of OpenBand's exclusive easement. *See infra* Section I.A.

[8] This conveyance was accomplished through two separate easements—one conveying between two entities owned by the developer and a second, executed the same day and essentially identical in structure, conveying this interest to OpenBand. *See* Complaint, Exhs. 2, 3.

written consent of the Grantee." *Id.* § 8. The parties then set out a covenant in the easement:

> [Developer] and [Lansdowne HOA] covenant that for the duration of this Easement they shall not grant any easements to Administer any Utilities on, under or across the Property, provided that [developer] and [Lansdowne HOA] shall have the express right to grant or assign other utility easements on the Property not inconsistent with the exclusive rights of Grantee herein.

*Id.*

*Convenants, Conditions, and Restrictions ("CC&Rs")*—In the CC&Rs, signed about one month later, the developer declared a variety of rights and restrictions on the use of the property that would become Lansdowne. Among these, the CC&Rs repeatedly restrict Lansdowne HOA and residents from taking actions or granting easements inconsistent with OpenBand's "exclusive" easement or right.[9]

[9] *See* Complaint, Exh. 6 at § 3.8(e) ("*CC&Rs*") (HOA may grant permits and easements for utilities "subject to the exclusive rights of a Telecommunications Provider"); *id.* § 4.7.1 (HOA may provide "additional services" to owners "[s]ubject to the exclusive rights of a Telecommunications Provider pursuant to one or more exclusive easements encumbering the Property"); *id.* § 8.1.3 (developer creates utility easement in Property "subject to the exclusive rights of a Telecommunications Provider pursuant to one or more exclusive easements encumbering the Property").

The TSA in turn makes the CC&Rs "a binding obligation of the HOA," and the HOA "covenants not to amend the CC&Rs such that the amendment would…have a materially adverse effect on [OpenBand]." *TSA* § 6.4(l).

**B. Decision Below**

In 2011, Lansdowne HOA, now representing residents of Lansdowne and no longer controlled by the developer, filed suit in the U.S. District Court for the Eastern District of Virginia against OpenBand, its parents and affiliates, and the developer. The HOA brought a number of claims for damages and declaratory and injunctive relief centering on OpenBand's exclusive arrangement to deliver Platform Services. Complaint 33-46. By June of 2012, only a claim for declaratory and injunctive relief under the FCC's *Exclusivity Order* remained.

On cross motions for summary judgment, the district court found that the contractual arrangement in place between Lansdowne HOA and OpenBand, including the TSA, easements, and CCRs, constituted an exclusive right to provide video programming services in violation of the *Exclusivity Order*. The court accordingly granted declaratory relief that those clauses were null and void and enjoined defendants from enforcing them. Op. at 34. The court found that 47 U.S.C. § 401(b) provided a private right of action because the *Exclusivity Order* "specifically defines the rights and

obligations that a litigant can enforce," Op. at 17, as contemplated by this Court's decision in *CGM, LLC v. BellSouth Telecomms. Inc.*, 664 F.3d 46 (4th Cir. 2011). It then found that OpenBand was subject to the *Exclusivity Order* as an OVS operator both because the defendants including OpenBand constituted a "group of persons" whose activities fell within the statutory definition of OVS operator, and alternately because OpenBand itself "provided" MVPD services by controlling the OVS operator Multimedia. Op. at 22-25.

Finally, the court found that the *Exclusivity Order* governed the arrangements in question. Defendants had argued that the *Order* reached only contracts and not easements, that the TSA was the only "contract" at issue, and that the TSA did not directly prohibit residents from contracting with MVPDs other than OpenBand. The court disagreed, finding that the *Order* "provide[s] strong evidence that the FCC issued its Order in contemplation of its application to precisely the type of exclusive easement granted to OpenBand." Op. at 30-31. In the alternative, the court concluded that the TSA, CC&Rs, and easements were "inextricably related" and entered into "for the purpose of establishing a unitary contractual matrix of interlocking obligations that create an impregnable, exclusive enclave for

OpenBand's delivery of wired telecommunications services at Lansdowne." Op. at 28.

## SUMMARY OF ARGUMENT

Under the arrangement put in place by appellants and the developer, only OpenBand and its affiliates can provide wireline video programming to Lansdowne residents. As the district court found, that is precisely the type of anti-competitive arrangement forbidden by the *Exclusivity Order*. This is true even though the exclusivity is effected in part by an easement, because the Commission clearly intended to reach easements with its *Order*. Moreover, the *Exclusivity Order* reaches OpenBand as an OVS operator, because OpenBand and Multimedia are a "group of persons" that together own and control an OVS and use it to deliver video programming. The decision below should be affirmed.[10]

[10] The Commission agrees with the district court and the appellee that the *Exclusivity Order* is an "order" that may be enforced under 47 U.S.C. § 401(b). It is well settled that a Commission "order" under section 402 of the Communications Act includes rulemaking orders "which affect or determine rights generally even though not directed to any particular person or corporation." *Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407, 417 (1942). There is no reason to think that the term means anything different in the immediately preceding section of the Act. *See Chesapeake & Potomac Tel. Co. of Maryland v. Pub. Serv. Comm'n of Maryland*, 748 F.2d 879, 881 (4th Cir. 1984), *vacated on other grounds*, 476 U.S. 445 (1986). In any event, the *Exclusivity Order* sets out the "specific rights and obligations" of MDU owners and OVS providers, and thus is enforceable under the standard enunciated by this Court in *CGM*, 664 F.3d at 54.

## ARGUMENT

### I. THE *EXCLUSIVITY ORDER* FORBIDS EXCLUSIVE ARRANGEMENTS LIKE THOSE AT LANSDOWNE.

#### A. The easements completely prevent competition by other video programmers.

OpenBand has an "exclusive easement" to "Administer" "Utilities" at Lansdowne. *OpenBand Easement* § 2.1(a). This easement is "reserve[d] solely" to OpenBand, so that "no other person or entity shall be entitled to Administer any Utilities on, under or across the Property without the written consent" of OpenBand. *Id.* § 8. The easement also contains the HOA's agreement that it will not grant an easement to Administer Utilities to anyone else that would be inconsistent with OpenBand's exclusive rights. *Id.* In other words, no other utility operator, including any wireline MVPD, can get access to property controlled by the HOA for the purpose of providing video programming to Lansdowne residents. Such an arrangement indisputably "prohibit[s] any other MVPD from any access whatsoever to the premises of the MDU…real estate development," *Exclusivity Order* ¶ 1 n.2.

OpenBand denies that the easements "'absolutely' prohibit access to Lansdowne" because OpenBand has the right to grant subeasements, raising the theoretical possibility that OpenBand might grant a competitor access to Lansdowne. Br. at 30. OpenBand does not represent to the Court that it has or would grant such a subeasement. In any case only OpenBand—not the

property owners or HOA—has the right to grant or deny access to a competitor. That is, OpenBand has the *right* to "prohibit any other MVPD from any access whatsoever" to Lansdowne, precisely as forbidden by the Commission. *Exclusivity Order* ¶ 1 n.2.

OpenBand also points out that the TSA purportedly grants homeowners the option to contract with an alternate provider. Br. at 9. Because the exclusive easement would prevent a provider from even reaching a homeowner, the option is meaningless.

**B. The *Order* reaches easements like those at issue.**

Even though this arrangement seeks to exclude competition completely, OpenBand argues that the FCC did not intend to reach it because it is effected in part through an easement.[11] As the district court noted, "it would be anomalous that a provider of video programming services could so easily evade the FCC's broad and comprehensive remedial order merely by structuring its prohibited exclusivity as defendants have done here." Op. at 32. There is absolutely no reason to think that the Commission intended to

[11] As the district court also found, the CC&Rs and the TSA in combination with the easement also form a "unitary contractual matrix of interlocking obligations" that serve to exclude access by competitors. Op. at 28. Because the *Exclusivity Order* reaches the easements directly, this court need not reach that issue, but the *Order* certainly should also be read to reach contracts that incorporate exclusive easements.

set up such a regime. As the present case shows, such an exception would swallow the rule.

This commonsense point is amply fortified by the record, which shows that the Commission considered, and intended to ban, exclusive easements of this type. In describing the type of "exclusivity clause" that the rule would reach, the Commission cited to comments from AT&T. *Exclusivity Order* ¶ 1 n.2. In these comments, two of the four examples of exclusivity arrangements are effected through "easements." *See* Comments of AT&T Inc. at 11 & n.30, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51 (July 2, 2007) (describing "broad exclusivity clauses" and citing to exhibit entitled "Easement and Memorandum of Agreement"); *id.* at 12 n.35 (citing to two exhibits with exclusive rights effected through "easements."). Indeed, those agreements are strikingly similar in structure to OpenBand's exclusive easement at issue here. *See id.* Exh. B §§ 1, 3 (easement made in coordination with separate contract for services; grantor covenants not to grant easements across property to other providers); *id.* Exh. C § 13(a) (grantor gives "exclusive easement in perpetuity" in property set aside for utility service).

It is unsurprising that the Commission saw no reason to draw distinctions between exclusivity arrangements embedded in easements versus those in other contracts—appellants themselves failed to do so. In comments during the rulemaking, Multimedia argued that its "exclusive contracts" were essential to its ability to recoup investment. *OpenBand Comments* at 3-4; *see Exclusivity Order* at nn.72, 76-77, 104, 116 (citing OpenBand Comments). In fact, the comments specifically mentioned service to the Lansdowne development. *OpenBand Comments* at 2. Thus, Multimedia itself treated the Lansdowne arrangement as an "exclusive contract" for the purposes of the Commission's MDU exclusivity proceeding.

In seeking to show that the FCC nevertheless intended to carve out easements from the rule, OpenBand misreads the *Exclusivity Order* in two ways. First, because the *Order* regulates MVPDs under the FCC's jurisdiction and not MDU owners, the Commission stressed that MDU owners would still be free to grant or deny access to their property to any particular MVPD. *Exclusivity Order* ¶ 37. OpenBand misreads this to imply the Commission sought to avoid impinging on OVS operators' "real property rights." Br. at 31. But the Commission sought to clarify that *MDU owners'* rights would be unaffected. The issue in this case is instead an *OVS*

*operator's* right to limit competition. That is precisely what the Commission intended to, and did, regulate.

Second, OpenBand cites to the FCC's statement that, because MVPDs will not be forced to share their physical wires with competitors, the *Order* "obviously does not involve the permanent condemnation of physical property." Br. at 32 (citing *Exclusivity Order* ¶ 55). Again, OpenBand misreads a more limited point. The Commission emphasized that MVPDs do not need to share their physical facilities. The district court's decision does not mandate any such sharing of OpenBand's physical property. Instead, the court required that OpenBand not enforce its right to exclude other providers. That is entirely consistent with—indeed, mandated by—the FCC's *Order*.

## II. OPENBAND AND ITS AFFILIATES FALL WITHIN THE *EXCLUSIVITY ORDER* AS AN OVS OPERATOR.

The *Exclusivity Order* applies to Open Video System (OVS) operators. *Exclusivity Order* ¶ 51. Appellants argue that it cannot apply to them because any exclusive arrangements with the HOA are with OpenBand, which appellants contend is not an OVS operator. But in fact, OpenBand and its affiliate Multimedia fit easily within the definition of OVS operator, because they constitute a (1) "group of persons" who (2) "provide[]" (3) "cable service" (4) "over an open video system," and who (4) "directly or through

one or more affiliates own[] a significant interest in such open video system." *See* 47 C.F.R. § 76.1500(b).

Appellants do not dispute that the communications infrastructure at Lansdowne constitutes an "open video system,"[12] nor that the video programming provided is "cable service."[13] Op. at 22. Nor do they dispute that OpenBand owns "a significant interest" in the infrastructure within Lansdowne used to provide that programming. *Id.* at 23.

Finally, Openband is part of a "group of persons" that "provides" this service. *See generally* Br. at 32-35. In the words of the district court, "Neither OpenBand nor Multimedia could perform as required without the other." Op. at 25. Operationally, only OpenBand has an easement to run wires to individual houses, *id*. at 8 n.9, so Multimedia could not actually reach its customers without use of OpenBand's portion of the network. And legally, it is OpenBand, not Multimedia, that has contracted with the HOA to

[12] An open video system is "[a] facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, provided that the Commission has certified that such system complies with this part." 47 C.F.R. § 76.1500(a).

[13] "Cable service" has the same definition for OVS operators and for cable operators and, as relevant here, refers generally to the one-way transmission of video programming to subscribers. *See* 47 C.F.R. §§ 76.5(ff) & 76.1500(f).

provide service and that bills and receives payment for those services. *TSA* §§ 2.1, 5.1. OpenBand has in turn subcontracted with Multimedia to provide certain of the video programming services "on [OpenBand's] behalf." Op. at 24. As the district court correctly found, "OpenBand, Multimedia [and the affiliated entities] are contractually, operationally, and legally connected to each other in a manner that allows them to operate as a single, integrated provider of cable service to Lansdowne residents." *Id.* at 25. The parent company has chosen to divide the function of an OVS operator among two of its wholly-owned subsidiaries. This cannot hide the fact that these entities constitute a single, integrated "group of persons" that "provides" video programming through an OVS.[14]

Appellants stress that only Multimedia has applied for and been granted certification to operate an OVS system. Br. at 34-35. In fact, when Multimedia applied for certification in November of 2000, OpenBand did not even exist, and so Multimedia represented that it would be operating the OVS (presumably alone).[15] That application, and the resulting certification, did not

[14] The district court also held that OpenBand, in itself, "provides" service over the OVS, and so is an OVS operator. Op. at 20-24. This Court need not reach that issue, given the ample support for the finding that OpenBand is an OVS operator as part of a "group" that provides service.

[15] *See OpenBand OVS Certification* (certification granted in December 2000, while OpenBand was created in March 2001).

contemplate that M.C. Dean would later split off responsibility for essential OVS functions and infrastructure to a separate entity, *id.* Appellants now argue that by doing so, M.C. Dean has absolved OpenBand of all regulation as an OVS operator, even though OpenBand is essential to provision of OVS service at Lansdowne. That is not a reasonable reading of the FCC's regulations and the Communication Act. As the district court recognized, certification is a *duty* of OVS operators, but it is not an element of the *definition* of OVS operator. Op. at 24 n.32. The definition requires only the provision of cable service over an OVS along with ownership or control. That describes OpenBand precisely.

## CONCLUSION

Because OpenBand satisfies the definition of an OVS operator, it is subject to the *Exclusivity Order*. And because the exclusivity clauses of OpenBand's easements are forbidden by that *Order*, they are null and void. The decision below should be affirmed.

Respectfully submitted,

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October 10, 2012

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CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Amicus Brief for the Federal Communications Commission in Support of Appellee in the captioned case contains 4,412 words.

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October 10, 2012

12-1925

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

**OpenBand at Lansdowne, LLC, *et al.*, Appellant**

**v.**

**Lansdowne on the Potomac Homeowners Association Inc., Appellee**

## CERTIFICATE OF SERVICE

I, Jacob M. Lewis, hereby certify that on October 10, 2012, I electronically filed the foregoing Amicus Curiae Brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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